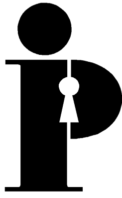

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1351

Appeal MA-000092-1

City of Welland

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The City of Welland (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of two identified reports. The City advised the requester that one report was publicly available, and denied access to the other report pursuant to section 7(1) of the *Act* (advice and recommendations).

The requester, now the appellant, appealed the City's decision.

The record at issue is a report prepared by a consultant retained by the City to investigate an allegation of workplace harassment made by the appellant during her period of employment with the City. The investigation was undertaken in accordance with the City's Workplace Harassment Policy.

During mediation, two additional issues were identified.

- The mediator raised the possibility that the report is excluded from coverage under the *Act* by virtue of section 52(3).
- Sections 14 and 38 of the *Act* were raised because the report appears to contain the personal information of both the appellant and other identifiable individuals.

Mediation was not successful, so I sent a Notice of Inquiry initially to the City and to the respondent in the harassment investigation, whose interests might be affected by this appeal (the affected person). I received representations from both the City and the affected person. I then sent the Notice to the appellant, together with a copy of the non-confidential portions of the City's representations. The appellant advised this Office that she would not be providing any representations.

RECORDS:

The record is a 17-page investigation report, as described above.

DISCUSSION:

JURISDICTION

Sections 52(3) and (4) read, in part, as follows:

> (3) Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

...

3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

(4) This Act applies to the following records:

1. An agreement between an institution and a trade union.

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the *Act*.

The City submits that the record falls within the parameters of paragraphs 52(3)1 and 3.

In order for the record to fall within the scope of section 52(3)1, the City must establish that:

1. the record was collected, prepared, maintained or used by the City or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; **and**

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the City.

To qualify under section 52(3)3, the City must establish that:

1. the records were collected, prepared, maintained or used by the City or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the City has an interest.

[Order P-1242]

Requirement one - sections 52(3)1 and 3

The City's representations provide an outline of the appellant's history of employment with the City, and a review of the circumstances leading to initiation of the investigation and preparation of the report. The City states that the investigation was initiated as a result of complaints made by the appellant under the City's Workplace Harassment Policy, and the report was prepared on behalf of the City by an independent consultant hired to undertake the investigation. The City further submits that the report was used by the City in considering what actions to take in response to the appellant's complaints concerning the affected person.

I am satisfied that the report was prepared and used by the City, and I find that the first requirement of sections 52(3)1 and 3 has been established.

Requirement two - section 52(3)1

The City submits that the report was prepared in contemplation of legal proceedings, either in a court or before the Ontario Human Rights Commission. The City's representations include quotations from documents the appellant provided to the City prior to the preparation of the report, in which she identifies various possible legal actions.

At the time the consultant undertook the investigation and submitted her report, I am satisfied that it was prepared in relation to anticipated proceedings before a court or tribunal. However, my decision regarding the application of section 52(3)1 does not end there.

The Commissioner's Office has given section 52(3) [and its equivalent provision, section 65(6), in the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*)] an interpretation which accords with the wording and accommodates the purposes of both the *Act*s and the amendments which subsequently incorporated sections 52(3)/65(6) within the statute (the Bill 7 amendments). The subject matter of the sections 52(3)/65(6) exclusions – "proceedings or *anticipated* proceedings", "negotiations or

anticipated negotiations" and "employment-related matters in which the institution *has* an interest" - demonstrates that the legislature intended to protect the confidentiality of records which have the capacity to affect the *current or future conduct* of an institution in the employment and labour relations context. This interpretation protects the confidentiality of past information about concluded proceedings, negotiations or other employment-related matters, provided: (1) the institution can establish that the information contained in the records reasonably relates to current or future anticipated proceedings or negotiations; or (2) that its labour relations or employment interests in the information are otherwise currently engaged, or there is a reasonable prospect that such interests will be engaged in the future (Order MO-1344).

In Order P-1618, I examined the general application of section 65(6) of the provincial *Act*, and outlined the approach that must be taken in applying this section in light of the stated intent and goal of the legislation which incorporated sections 65(6)/52(3) within the statutes. I found the following:

> In my view, section 65(6) must be understood in context, taking into consideration both the stated intent and goal of the *Labour Relations and Employment Statute Law Amendment Act* (Bill 7) - to restore balance and stability to labour relations and to promote economic prosperity; and overall purposes of the *Act* - to provide a right of access to information under the control of institutions and to protect the privacy of and provide access to personal information held by institutions.

I then went on to apply this approach to the specific provisions of section 65(6)1 of the provincial *Act*, which deal with "proceedings or anticipated proceedings", and determined that:

> When proceedings are current, anticipated, or in the reasonably proximate past, in my view, there is a reasonable expectation that a premature disclosure of the type of records described in section 65(6)1 could lead to an imbalance in labour relations between the government and its employees. However, when proceedings have been completed, are no longer anticipated, or are not in the reasonably proximate past, disclosure of these same records could not possibly have an impact on any labour relations issues directly related to these records, and different considerations should apply.

My findings in Order P-1618 were upheld on judicial review in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2000] O.J. No. 1974 (Div. Ct.), leave to appeal granted (June 29, 2000), Docs. M25698, M25699, M25700 (C.A.).

Accordingly, it is not sufficient for the City to establish that proceedings were anticipated at the time the report was prepared. Applying the reasoning of Order P-1618, the City must establish that any proceedings or anticipated proceedings in this regard are current, anticipated, or in the reasonably proximate past.

The City states that a settlement was reached with the appellant in October 1998, wherein she released the City from any claims arising out of her employment, including human rights complaints. Neither the City nor the appellant has identified any ongoing matters between them, and the appellant is no longer employed by the City. Consequently, I find that there is no longer any current or anticipated proceedings as between the appellant and the City.

However, the City takes the position that the report was also prepared in relation to anticipated proceedings involving the affected person, who continues to be employed by the City. In that regard the City states as follows:

> Additionally, there was every expectation that [the affected person] would react negatively if [the report] made findings against him and the employer took steps to affect his employment relationship which had a reasonable prospect of involving court action against the City by [the affected person]. These reasonable expectations on the part of the City did materialize. ...

The City makes reference to an October 1998 letter received from the affected person's lawyer asking for information, but the City provides insufficient evidence to establish that any legal action was commenced, remains ongoing or is reasonably anticipated as a result of the report.

The affected person's representations outline concerns about disclosing the report and attach correspondence sent by him after the report was submitted to the City by the consultant. However, the most recent correspondence is a February 1999 letter which states that he will not be pursuing one particular legal avenue. The affected person, like the City, provides insufficient evidence to establish that any legal action was commenced, remains ongoing or is reasonably anticipated.

Accordingly, I find that there are no current or reasonably anticipated proceedings relating to the report, nor any proceedings in the reasonably proximate past that are sufficient to establish the second requirement under section 52(3)1. For these reasons, I find that section 52(3)1 does not apply in the circumstances of this appeal.

Requirement two - section 52(3)3

The City states that the report was used "in relation to meetings, consultations and discussions concerning the employment relationship of [the affected person] as well as the potential claims by the appellant which flowed from her employment relationship with the City."

I concur, and find that the second requirement of section 52(3)3 has been established.

Requirement three - section 52(3)3

Section 52(3)3, requires that the meetings, consultations, discussions or communications must be "about labour relations or employment-related matters". The report deals exclusively with a complaint made bythe appellant as an employee of the City, pursuant to the City's Workplace Harassment Policy. The actions that took place in this context are clearly about an employment-related matter.

The only remaining issue is whether this is an employment-related matter in which the City "has an interest".

An "interest" is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the City has an interest must have the capacity to affect the City's legal rights or obligations (see Orders M-1147 and P-1242). Furthermore, there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has the requisite interest. (See Orders P-1618, P-1627 and PO-1658, all of which applied this reasoning and were the subject of judicial review by the Divisional Court and were upheld in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [200] O.J. 1974 (Div. Ct.), leave to appeal granted (June 29, 2000), Docs. M25698, M25699, M25700 (C.A.)).

The City addresses this issue as follows:

> It is submitted that the City clearly had and continues to have an interest in the employment related matters concerning [the affected person] in that he continues to occupy an important [specific type of] position with the City. The City's direct legal interest is engaged because it affects the ongoing employment relationship with an employee, and the potential for claims against the City ...

The City points out that the report continues to be a key document that would be used in supporting or defending any future action involving the affected person that the City deems appropriate.

A number of previous orders have examined the application of section 52(3)3 in circumstances where an institution has expressed concerns about litigation or actions that might arise in the future. In Order PO-1718, former Adjudicator Holly Big Canoe made the following statements regarding the treatment of audit reports under section 65(6)3 of the provincial *Act*:

> The Ministry refers to the possibility of some legal action being taken as a result of the audit or disclosure of the audit, and relies on the due performance of its ongoing responsibilities to establish that its legal interests are engaged. In my view, the mere possibility of future legal action, which may be said to arise out of many kinds of audit or regulatory activities of government, is insufficient to engage a reasonable anticipation of such action actually occurring or, therefore, to engage an active legal interest. Further, the due performance of

> supervisory activities in setting clear standards and procedures, even with a view to avoiding exposure in possible future legal proceedings, is also insufficient to engage an active legal interest. In my view, unless there is something that arises to give reality to the prospect or anticipation of such action, government's "interest" in the record relates to the normal course of its affairs, and the requisite legal interest is not established.
>
> The only relevant evidence before me in this appeal establishes that there is no reasonable prospect that the institution's legal interest will be engaged. Accordingly, I find that there is no ongoing dispute or other employment-related matter involving the [Criminal Injuries Compensation] Board that has the capacity to affect the Board's legal rights or obligations, and the Board has failed to establish a "legal interest" in the employment-related matters reflected in the records (see also Order M-1164).

I adopt the approach taken in Order PO-1718.

The City takes the position that it maintains a legal interest in the report based on the possibility of litigation. According to the City, the prospect of litigation continues, and the City therefore maintains a legal interest in the report. I do not accept this position. Taken to the extreme, the City's position would imply that the City maintains a legal interest in the report as long as the affected person remains an employee. This is clearly not supportable. As was the case in Order PO-1718, the City in the current appeal has provided insufficient evidence to establish that there is a reasonable prospect that its legal interest will be engaged. In my view, merely identifying the possibility of future legal action is insufficient to create a reasonable anticipation of such action actually occurring.

Accordingly, I find that the City has not demonstrated that it has sufficient legal interest in the report to bring it within the scope of section 52(3)3.

Therefore, section 52(3)3 does not apply in the circumstances of this appeal, and I find that the report falls within the jurisdiction of the *Act*.

PERSONAL INFORMATION

Section 2(1) of the *Act* defines "personal information" in part as recorded information about an identifiable individual.

The report concerns complaints made by the appellant to the City primarily about the affected person. It contains references to incidents, statements and observations made by witnesses, as well as the views of the author of the report about various individuals and their actions. I find that the information in the report is about the appellant, the affected person and other identifiable individuals, and satisfies the definition of personal information under section 2(1) of the *Act*.

DISCRETION TO REFUSE REQUESTER'S OWN PERSONAL INFORMATION

Section 36(1) of the *Act* gives individuals a general right of access to personal information about

themselves in the custody or under the control of an institution. However, this right of access is not absolute. Section 38 provides a number of exceptions to this general right of access.

Advice or Recommendations

Under section 38(a) of the *Act*, the City has discretion to deny access to an individual's own personal information in instances where certain exemptions would apply, including section 7(1). The City takes the position that the report qualifies for exemption under this section of the *Act*, which reads as follows:

> A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

Previous orders of the Commissioner have established that advice and recommendations, for the purposes of section 7(1), must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Order P-365, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)*, Toronto Doc. 721/92 (Ont. Div. Ct.)).

The City's position is set out as follows:

> ... While no specific recommendation or course of action is set out in [the report], its comments on issues of credibility and findings as to conduct are akin to the provision of advice, since that information was directly taken into account by the City in assessing an appropriate response.

As the City acknowledges, the report contains no specific recommendations or course of action. As far as advice is concerned, I do not accept the City's position. The report is largely factual in nature, outlining the results of interviews with the appellant, the affected person and other employees. It includes an analysis and conclusions based on an assessment of the facts, but does not suggest a course of action that will ultimately be accepted or rejected by the City in deciding how to proceed. The analysis does include comments on credibility, and the report does draw conclusions based on the investigation; however, in my view, this does not constitute "advice" as the term has been defined and interpreted by this Office in past similar appeals.

Accordingly, I find that the requirements of section 7(1) have not been established, and the report does not qualify for exemption under section 38(a) of the *Act*.

Invasion of privacy

Section 38(b) of the *Act* provides:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 38(b) introduces a balancing principle. The City must look at the information and weigh the appellant's right of access to her own personal information against the rights of other individuals, in particular the affected person, to the protection of their personal privacy. If the City determines that the release of the information would constitute an unjustified invasion of another individual's privacy, then section 38(b) gives the City discretion to deny the appellant access to her personal information.

Sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of an individual's personal privacy. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

The City submits that the presumptions in sections 14(3)(b) (possible violation of law), 14(3)(d) (employment history), and 14(3)(g) (personal recommendations and personnel evaluations) apply to the report; and also identifies the factors in section 14(2(e) (unfair exposure to harm), 14(2)(f) (highly sensitive), 14(2)(h) (supplied in confidence) and 14(2)(i) (unfair damage to reputation) in support of its position that disclosure of the report would constitute an unjustified invasion of the privacy of the affected person and other individuals.

Section 14(3)

Sections 14(3)(b), (d) and (g) state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
> >
> > (d) relates to employment or educational history;

> (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

In order to qualify under the presumption found in section 14(3)(b), the City must establish that the information in the record was compiled and is identifiable as part of an investigation into a possible violation of law. I find the report was compiled as part of an internal investigation undertaken by the City into a possible breach of its Workplace Harassment Policy. An internal policy of this nature is not a "law", and I find that the section 14(3)(b) presumption has no application in the circumstances of this appeal (Orders 165 and P-552).

In order to qualify as "employment or educational history" for the purposes of section 14(3)(d), the information must contain a significant part of the history of the person's employment or education (Order MO-1343). No such information is contained in the report. The report describes a number of discrete incidents involving a number of City employees. The report does not focus on or describe the history of the appellant's employment relationship, nor that of any other employee, including the affected person. The incident-based complaints described in the report cannot accurately be characterized as the employment history of any of the individuals, and I find that section 14(3)(d) does not apply (Orders P-694 and MO-1343).

As far as section 14(3)(g) is concerned, I find that the report does not contain "personnel evaluations", a term associated with human resources management. I also find that it does not contain "personal evaluations". The report was prepared by a professional consultant hired by the City to conduct an investigation and determine whether workplace harassment had taken place. The observations and comments are a review of the facts giving rise to the complaint, including interviews with witnesses and the parties, as well as an analysis and conclusions based on an assessment of these facts. In my view, any evaluative aspect of the report is professional, not personal, in nature, and I find that section 14(3)(g) does not apply in the circumstances of this appeal (Order P-694).

Section 14(2)

Sections 14(2)(e), (f), (h) and (i), all of which favour privacy protection, read as follows:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;

> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

For section 14(2)(e) to apply, it is not sufficient to establish that the damage or harm envisioned is present or foreseeable; it must also be "unfair" to the individual involved (Orders P-256 and P-710). Similarly, for section 14(2)(i) to be relevant, I must find that disclosure of the personal information could not only damage and individual's reputation, but also that this damage would be "unfair" (Order P-515).

Although the City refers to the factors set out in sections 14(2)(e) and (i), it does not provide reasons why these factors might apply to the report. The report stems from allegations of workplace harassment, and was prepared by an outside consultant with expertise in the field. These are sensitive matters which have the potential to impact on the reputation of the individuals involved, and to expose those individuals, in a broad sense, to "other harm", as the phrase is used in section 14(2)(e). However, any harm or damage that may occur arises as the by-product of a valid process instituted by the City for the purpose of maintaining a healthy workplace, in accordance with the requirements of the Ontario Human Rights Code, and, in my view, would not be "unfair". For this reason, I find that sections 14(2)(e) and (i) are not relevant factors in the circumstances of this appeal.

In order for personal information to be considered highly sensitive for the purposes of section 14(2)(f), disclosure must reasonably be expected to cause the individual excessive personal distress (Orders M-1053, P-1681 and PO-1736). In my view, when sensitive allegations of workplace harassment of the sort mentioned in the report are made and investigated, it is reasonable to expect that the parties directly involved would experience excessive personal distress if details of the incidents were broadly known. Accordingly, I find that section 14(2)(f) is a relevant factor in this appeal, as it relates to the parts of the report containing the personal information of the affected person and other identifiable individuals. As far as the appellant is concerned, I find that disclosure of her own personal information would not cause excessive personal distress, and that this factor has no relevance. I similarly find that disclosure of information which would identify the affected person and the other respondents named in the appellant's complaint, and the issues identified by the consultant as arising from the complaint which does not disclose the personal information of other individuals, would not cause excessive personal distress to any individuals and the section 14(2)(f) factor is not relevant to these portions of the report.

In order for section 14(2)(h) to apply, the person who supplied the information must have had a reasonably held expectation that the information would be treated in a confidential manner (Order PO-1767). In Order

M-82, former Adjudicator Big Canoe made the following comments regarding this section in the context of an appeal involving records created during an investigation of workplace harassment:

> In my view, it is neither practical nor possible to guarantee complete confidentiality to each party during an internal investigation of an allegation of harassment in the workplace. If the parties to the complaint are to have any confidence in the process, respondents in such a complaint must be advised of what they are accused of and by whom to enable them to address the validity of the allegations. Equally, complainants must be given enough information to enable them to ensure that their allegations were adequately investigated. Otherwise, others may be discouraged from advising their employer of possible incidents of harassment and requesting an investigation, which runs counter to a policy the purpose of which is to promote a fair and safe workplace.

I agree with these comments.

I find that section 14(2)(h) is a relevant factor as it relates to the information supplied to the consultant by the affected person and other employees interviewed during the course of the investigation. However, I find that providing the appellant with access to her own personal information would not raise the same confidentiality considerations. I also find that by settling all claims, it is reasonable to conclude that the appellant was satisfied that her allegations were adequately investigated, thereby minimizing the relevance of this factor as it relates to the appellant's own personal information.

In balancing the various factors favouring privacy against the rights of the appellant to obtain access to her own personal information, I find that the parts of the report outlining the substance of the appellant's complaint and the specific issues identified by the consultant as arising from the complaint would not constitute an unjustified invasion of the privacy of the affected person or any other individual and should be disclosed to the appellant. I find that disclosure of all other parts of the report, which contain the personal information of individuals other than the appellant, and include statements made by the affected person and other individuals, the analysis of the actions of these individuals, and the conclusions and summaries reached regarding these individuals, would constitute an unjustified invasion of their personal privacy, and I uphold the City's decision to deny access to those parts of the report under section 38(b) of the *Act*.

The City provided me with representations on the exercise of discretion in denying access to the report under section 38(b) of the *Act*. The factors considered by the City relate to the content of the report, the sensitive nature of the complaint and subsequent investigation, and the ongoing employment relationship between the City and the affected person. I find that the City has properly exercised discretion in favour of denying access to the parts of the report I have found qualify for exemption under section 38(b).

ORDER:

1. I order the City to disclose the portions of the report outlining the substance of the appellant's complaint and the portions of the analysis which do not involve personal information of other identifiable individuals. Disclosure is to be made by the City by **November 24, 2000** but not before **November 20, 2000**.

2. I uphold the City's decision to deny access to the remaining parts of the report. I have attached a highlighted copy of the report with the copy of this order sent to the City's Freedom of Information and Privacy Co-ordinator which identifies the parts of the report that should **not** be disclosed.

3. In order to verify compliance with the provisions of this order, I order the City to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: October 19, 2000
Tom Mitchinson
Assistant Commissioner